
LEGAL ALERT

Supreme Court Holds That Company May Be Liable For The Discriminatory Motives Of Non-Decision Makers

On March 1, 2011, the U.S. Supreme Court held that an employer may be liable for the discriminatory motives of a supervisor who influences but does not make the ultimate employment decision. The Court's ruling will impact employment discrimination claims where multiple individuals are claimed to have made, caused, or influenced the ultimate employment decision. *Staub v. Proctor Hospital*.

The Cat's Paw Theory Of Liability

In employment discrimination claims, plaintiffs must establish that the employer took an adverse employment action based, in whole or in part, on their protected status, such as age, sex or religion among many others. Employees typically prove their claims by demonstrating that the ultimate decision maker had a discriminatory motive for the employment action. But where the ultimate decision maker is admittedly unbiased, several courts have allowed employees to use a subordinate bias or "cat's paw" theory of liability to prove their claims.

The term "cat's paw" derives from the 17th century fable of *The Monkey and the Cat* where a clever monkey persuades a cat to pull chestnuts from the fire by flattering the cat and promising to share the chestnuts. The unwitting cat burns its paws removing the chestnuts from the fire while the monkey sits back and eats all of the chestnuts. As in the fable, a biased supervisor can dupe an unbiased decision maker into taking an adverse employment action based on inaccurate, incomplete, or misleading information.

Courts of Appeal have applied at least three distinct approaches when addressing the subordinate bias theory of liability. At one end of the spectrum, some courts have held that subordinate-bias liability is available when the subordinate with the discriminatory animus provides input that may have affected the adverse employment action. At the other end of the spectrum, other courts hold that subordinate-bias liability is only available if the biased subordinate is the actual decision maker, regardless of whether the subordinate exercised substantial control or played a



significant role in the decision. In the middle ground, subordinate-bias liability is available if the biased subordinate uses the formal decision maker as a pawn in a deliberate effort to trigger a discriminatory employment action.

Today, the Supreme Court has clarified the standard by which an employer may be held liable for discrimination based on a subordinate supervisor's discriminatory animus when the ultimate decision maker is admittedly unbiased.

Hospital Makes Termination Decision Without Knowing All Of The Relevant Facts

Vincent Staub worked at Proctor Hospital as an angiography technologist in the Diagnostic Imaging Department. Staub was also a member of the United States Army Reserves. As a reservist, Staub was obligated to attend training sessions one weekend a month and two full weeks during the year. In addition, Staub was required to report to active duty when called.

Michael Korenchuk was the head of the Diagnostic Imaging Department at Proctor Hospital. Janice Mulally was second in command,

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in charge of preparing work schedules for the department. Mulally began scheduling Staub to work weekends, which created conflicts with Staub's military obligations. When Staub raised the issue with Mulally, she threw him out of her office and said she did not want to deal with it. Occasionally, Mulally made Staub use his vacation when he had to attend military training and scheduled him for additional work shifts without notice. Mulally called Staub's military duties "bull****" and said the extra shifts were his "way of paying back the department for everyone else having to bend over backward to cover [his] schedule for the Reserves."

Korenchuk was not sympathetic to Staub's plight. He also characterized Staub's weekend military obligations as "Army Reserve bull****" and "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money." Korenchuk also told one of Staub's coworkers that Mulally was "out to get" Staub.

Shortly after Staub received an order to report for "solider readiness processing," a precursor to active deployment, Mulally gave Staub a written warning for disregarding his job duties. Specifically, Mulally accused Staub of failing to assist with other diagnostic imaging procedures within the department when requested. Staub disputed the basis for the warning and refused to sign it. Nevertheless, the warning stood and Staub was instructed to report to Korenchuk or Mulally when he had completed his angiographic duties and did not have any patients. Staub was also instructed to remain in the general diagnostic area unless he told Korenchuk or Mulally where he was going and why.

Mulally then called Staub's Reserve Unit Administrator, Joseph Abbidini, and asked if Staub could be excused from some of his military duties because he was needed to work. Abbidini told Mulally that the training was mandatory and that Staub could not be excused. Mulally called Abbidini an "a**hole" and hung up.

A couple of months later, Staub completed his angiographic procedures around noon and decided to go to lunch. Because of the warning he had received, Staub went to Korenchuk's office to tell him that he was going to lunch. Korenchuk was not in his office, so Staub called Korenchuk and left a voicemail message notifying Korenchuk that he was going to the cafeteria for lunch. Staub returned to work 30 minutes later. Korenchuk confronted Staub and demanded to know where he had been. Staub explained that he had gone to lunch in the cafeteria and had left Korenchuk a voicemail message to notify him. Korenchuk was not satisfied with the explanation and escorted Staub to the Human Resources Department where they met with Linda Buck, the Vice-President of Human Resources.

Korenchuk had already met with Buck and told her that Staub failed to report his whereabouts as instructed and that he could not be located. Accordingly, a decision was made at that time to terminate Staub. When Staub walked into Buck's office, she handed him his termination notice and the security guard escorted Staub out of the building. According to the termination notice, Staub was discharged for failing to comply with the written warning instructing him to report to Korenchuk whenever he had completed his angiographic procedures and did not have any patients. Notably, Korenchuk did not tell Buck about Staub's voicemail message.

Prior to deciding to terminate Staub, Buck reviewed Staub's personnel file, including his positive annual performance evaluation and the prior written warnings. Buck also relied on input from Korenchuk, but the ultimate decision to terminate Staub was Buck's. Staub's involvement with the military played no role in Buck's decision to terminate Staub.

After his termination, Staub filed a lawsuit against Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) alleging that he was terminated based on his military involvement. USERRA prohibits an employer from denying "employment, reemployment, retention in employment promotion, or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service," and provides that liability is established "if the person's membership ... is a motivating factor in the employer's action."

At trial, the jury sided with Staub and found that Staub's military status was a motivating factor in the decision to terminate him. Proctor Hospital appealed the verdict to the U.S. Court of Appeals for the 7th Circuit. On appeal, Proctor argued that the Court improperly admitted evidence of discriminatory animus by non-decision makers.

The Seventh Circuit reversed the jury's verdict, finding that there was insufficient evidence for a jury to conclude that Staub was fired because he was a member of the military. Specifically, the Seventh Circuit concluded that Proctor Hospital could not be liable to Staub under a subordinate-bias or cat's paw theory of liability because a reasonable jury could not find that Korenchuk, Mulally (or anyone else) had "singular influence" over Buck, who was admittedly unbiased.

The Supreme Court Defines the Scope of Employer Liability

In a decision delivered by Justice Scalia, the Supreme Court held that, "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." Justices Roberts, Kennedy, Ginsburg, Breyer, and Sotomayor, joined in the decision. Justice Alito filed an opinion concurring in the judgment, in which Justice Thomas joined. Justice Kagan took no part in the consideration or decision of the case.

The Court further declined to adopt a blanket rule immunizing an employer who performs an independent investigation of the conduct that led to the adverse employment action. Instead, the Court provided a very limited exception to liability where subordinate bias is at issue:

Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.

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Accordingly, the biases of those who make, cause, or influence the employment decision are relevant and can be considered when determining employer liability.

How Will This Decision Impact Employers?

The Court's decision adds another layer of potential liability for employers in USERRA claims and other types of discrimination claims where an individual's protected status is a "motivating factor" in the adverse employment action. Indeed, the decision makes it clear that if the biased motives of a subordinate supervisor influenced the chain of events that led to the adverse employment action, the employer may be liable for discrimination, even if the ultimate decision maker had no discriminatory intent.

As a result of the Court's decision today, employers will have to look more carefully at an employee's prior conduct and the discipline or corrective action issued before taking an adverse employment action. The ultimate decision maker can no longer rely solely on the content of an employee's personnel file or the recommendation of an employee's immediate supervisor before taking an employment action and, instead, must conduct an independent investigation to confirm that there is a legitimate non-discriminatory reason for the adverse employment action.

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